

2. The Proposed Transaction Would Increase Incentives for AT&T and Verizon to Raise Their Already Inflated Special Access Rates

As CRA explains, AT&T's proposed takeover of T-Mobile would make it more likely that AT&T and Verizon will be able to raise their prices for retail services and exclude competitors by further increasing the special access rates they charge Sprint and other retail competitors and/or reducing the quality of service they provide to those carriers.¹⁵⁴ Raising the input costs of their retail rivals would enable AT&T and Verizon to capture the additional revenues generated by higher retail prices if their competitors match their price increases and, at the same time, prevent competitors from winning customers away from AT&T and Verizon by offering lower prices. As their special access costs rose, Sprint and other competitive providers would be forced to raise their own retail rates and/or reduce the investments they make to expand and upgrade their networks.¹⁵⁵ Increased rates, potentially combined with deteriorating service, would drive customers away from competitive providers, allowing AT&T and Verizon to increase their number of subscribers even as they raised retail rates.¹⁵⁶ Thus, the ultimate victims

05-25, at 13 (July 29, 2005) (explaining that prices for a special access circuit can be as much as three times lower in areas where incumbent LECs are subject to competition); *see also* Reply Comments of T-Mobile USA, Inc., WC Docket No. 05-25, at 7 (Feb. 24, 2010) (explaining that “introducing true competitive alternatives in areas served by only one supplier is far superior to relying on regulatory mandates” in ensuring that backhaul connectivity is available at reasonable rates and with reasonable terms and conditions); *id.* at 8 (“competition is much more effective than regulation to ensure the reasonableness of rates, terms, and conditions”).

¹⁵⁴ CRA Decl. ¶¶ 51, 98.

¹⁵⁵ Higher special access costs would create a vicious cycle: competitive carriers would be unable to make the investments needed to attract and retain customers; this would lead to a smaller subscriber base, which would cause competitive carriers to lose economies of scale and network effects; this, in turn, would further reduce competitors' ability to lower retail prices or invest in upgrading their networks, further hampering the competitive carriers' ability to attract and retain customers.

¹⁵⁶ *The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S.*

of the merger would be consumers who would face higher retail rates and be denied the prospect of innovative new services fostered by a competitive marketplace.¹⁵⁷

G. The Proposed Takeover Likely Would Raise Roaming Costs, Leading to Higher Prices

AT&T's proposed takeover of T-Mobile would allow AT&T and Verizon to exclude competitors by raising their costs and degrading their service quality due to their control over roaming. Through previous mergers in which they acquired the largest providers of rural coverage – including Dobson, Centennial, and ALLTEL – AT&T and Verizon have assembled large wireless footprints. Post-merger, the Twin Bells would understand that they control the key assets necessary for Sprint and others to offer nationwide service through roaming, and that if they both raise prices they will earn greater returns while simultaneously raising their rivals' costs. This would effectively set a price floor by increasing the cost structures of all other carriers. As wireless competitors and gatekeepers to essential roaming service, the Bells would

Comm. on the Judiciary, 112th Cong., at 5 (May 11, 2011) (testimony of Daniel R. Hesse, CEO, Sprint Nextel Corporation) (explaining that if the merger were approved, it “would be difficult for any company to effectively challenge the Twin Bell duopoly, even if the duopolists reduce[d] quality [or] raise[d] prices”), available at: <<http://judiciary.senate.gov/pdf/11-11-5%20Hesse%20Testimony.pdf>> (“Hesse Testimony”).

¹⁵⁷ See, e.g., Comments of T-Mobile USA, Inc., WC Docket No. 05-25, at 8 (Aug. 8, 2007) (explaining that “[c]onsumers ultimately suffer from the high cost of special access” and describing the investments T-Mobile and other providers would make to achieve “customer-focused improvements” if special access were available at more reasonable rates); Reply Comments of T-Mobile USA, Inc., WC Docket No. 05-25, at 2 (Feb. 24, 2010) (“Consumers will enjoy the benefits of ubiquitous mobile broadband service and choice among service providers only if . . . special access[] is available at reasonable rates, terms, and conditions. . . .”); see also Hesse Testimony at 2-3 (explaining that competition and innovation led to the deployment of 4G services); *The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 112th Cong., at 5 (May 11, 2011) (testimony of Gigi B. Sohn, President, Public Knowledge) (providing other examples of benefits that competition has brought to the wireless marketplace), available at: <<http://judiciary.senate.gov/pdf/11-5-11%20Sohn%20Testimony.pdf>>.

have every incentive to deny Sprint and the smaller fringe carriers access to their networks for roaming or to increase their fees to erode the ability of Sprint and other firms to effectively compete on price.

The combination of AT&T and T-Mobile would be particularly devastating for carriers using the GSM standard because the combination of AT&T and T-Mobile would leave just one national carrier for GSM roaming. Indeed, as the President and CEO of Cellular South has warned, “[i]f AT&T is permitted to take over T-Mobile, AT&T would be the only potential nation-wide GSM roaming partner for competitive carriers.”¹⁵⁸ In its declaration, CRA points out that when the only two CDMA carriers in Mexico merged, Sprint’s roaming rates increased by more than [begin confidential information] [end confidential information] percent almost immediately and have increased by more than [begin confidential information] [end confidential information] percent in total since the merger.¹⁵⁹

The eventual transition of carriers from GSM and CDMA to LTE would not cure this competitive problem. First, any transition is likely to occur over many years and existing 3G technologies are likely to continue to provide an important access point for consumers for many years, just as second generation (“2G”) offerings do today. Second, the LTE configurations of both AT&T and Verizon, as presently devised, would not allow roaming on their networks without additional hardware and software. Unlike the cellular and PCS bands, where consumer devices were capable of operating across the entire bands regardless of the particular licensing block assigned to a carrier, AT&T and Verizon have obtained unique “Band Class” designations

¹⁵⁸ Meena Testimony at 10.

¹⁵⁹ CRA Decl. ¶ 100, n.92.

for their respective 700 MHz spectrum block assignments.¹⁶⁰ What this means is that the LTE equipment standards permit AT&T and Verizon to have device manufacturers build handsets and other devices that will operate only in each carrier's Band Class (the carrier's licensed spectrum) – even if both carriers are operating otherwise compatible LTE broadband networks.¹⁶¹

AT&T and Verizon are using their market power, size, and scale advantages to limit the devices they sell to their own spectrum blocks, thereby preventing customers from roaming or from taking their LTE devices to another carrier.¹⁶² The result is that the smaller 700 MHz licensees, and even prospective 700 MHz public safety broadband users, will not only be precluded from roaming on AT&T or Verizon's 700 MHz LTE networks, but they will be excluded from sharing in the scale efficiencies and lower costs that a common Band Class would bestow on all Band Class members. AT&T and Verizon are thus exercising their market power to deny competitors the scale advantages they would otherwise enjoy from handsets built to operate across the 700 MHz band.

H. The Proposed Transaction Would Reduce Competition in Upstream Markets

AT&T's acquisition of T-Mobile would create a bottleneck between downstream customers and the upstream content and product developers that need a wireless bridge to offer

¹⁶⁰ Lynette Luna, *700 MHz interoperability issue should have been on FCC's agenda*, FIERCEBROADBANDWIRELESS (Apr. 14, 2011), available at: <<http://www.fiercebroadbandwireless.com/story/700-mhz-interoperability-issue-should-have-been-fccs-agenda/2011-04-14>>.

¹⁶¹ *Id.*

¹⁶² See Phil Goldstein, *AT&T, Cellular South debate 700 MHz interoperability at FCC*, FIERCEWIRELESS (Apr. 26, 2011) available at: <<http://www.fiercewireless.com/story/att-cellular-south-debate-700-mhz-interoperability-fcc/2011-04-26>> (“Smaller and rural carriers have claimed that Verizon and AT&T are ordering LTE equipment that will not work with the band classes of 700 MHz spectrum they own, effectively shutting them out of the growing LTE ecosystem.”).

their products to consumers. Allowing AT&T and Verizon to control the vast majority of all traffic over this wireless bridge would hamper the growth of the digital economy and the Internet.

Many companies rely on wireless services to distribute their products to consumers. For example, eBay alone expects to sell over four billion dollars of goods over mobile connections in 2011.¹⁶³ A bottleneck created by the Twin Bells would allow them to charge supra-competitive prices to the upstream technology industry, thus making those upstream businesses less attractive and leading to less investment, less innovation, and fewer jobs. Mobile applications and commerce, and the technologies that support them, are perhaps the most important growth vector of technology companies like Amazon, Apple, eBay, and thousands of others which continue to maintain U.S. leadership in the Internet. The availability of competitive mobile broadband access has allowed tech companies to invest and innovate with the belief that they could monetize their new products and services without having to pay a supra-competitive toll to a carrier controlling access to consumers. Freed of effective competitive constraint following the takeover of T-Mobile, AT&T could also exercise market power over video, music, and other content providers by, among other things:

- Raising prices;
- Charging a premium to deliver quality video content to AT&T's more than 130 million post-merger wireless customers;
- Charging a premium to place a phone application in a visible location on its customers' devices; or

¹⁶³ Rachael Metz, *EBay first-quarter profit rises 20%*, SeattlePI, Apr.30, 2011, available at: < <http://www.seattlepi.com/business/article/EBay-first-quarter-profit-rises-20-percent-1355339.php> >.

- Demanding a share of advertising revenue sold over its devices in exchange for delivering content to end users on a priority basis.

If the takeover is approved, parties could have to pay Verizon and AT&T to deliver their applications and information to consumers, and these gatekeepers could raise prices and reduce the incentives of upstream innovators to offer new and better products.

IV. AT&T'S ARGUMENTS THAT THE TAKEOVER OF T-MOBILE WILL NOT REDUCE COMPETITION ARE WITHOUT MERIT

To deflect concerns about the reduction in competition that would result from its takeover of T-Mobile, AT&T argues that T-Mobile is in terminal decline as a competitor so eliminating it is not meaningful, and smaller local and regional players will offset any loss in competition.

Neither argument withstands scrutiny.

A. AT&T's Claims that T-Mobile Is Not Competitively Significant Are Belied by the Evidence

AT&T claims that eliminating T-Mobile would not reduce competition because “T-Mobile USA does not exert strong competitive pressure on AT&T and the two brands serve substantially different groups of subscribers.”¹⁶⁴ AT&T further argues that the merger “will not eliminate a major competitive force from the marketplace [because] T-Mobile USA is now ‘struggling for relevance’ in this increasingly competitive market.”¹⁶⁵ AT&T also claims that absent the merger T-Mobile would have “decreasing significance in the higher end of the market because T-Mobile USA has no clear path to deploy LTE” and that T-Mobile “would be subject

¹⁶⁴ Application at 98.

¹⁶⁵ *Id.* at 100-01.

to substantial spectrum limitations and capital-financing challenges.”¹⁶⁶ AT&T grossly mischaracterizes and understates T-Mobile’s competitive significance today and in the future.

1. T-Mobile Is and Will Continue to Be a Strong Competitor

T-Mobile is a strong competitor to AT&T. T-Mobile consistently out-performs AT&T on customer service, it offers lower pricing for handsets and services, it has upgraded more of its network for high speed data services than AT&T, it has constructed a national network, it has helped develop and launch new innovative handsets (such as the G1), and it engages in aggressive advertising against AT&T. Indeed, T-Mobile’s advertising mocking AT&T’s high speed data services has been the talk of the industry. The fact that T-Mobile lost post-paid subscribers in the past quarter is not evidence of a failing firm.

AT&T’s claim that T-Mobile is failing is belied by pre-merger statements of T-Mobile’s executives and the Commission’s own findings. For example, at its investor day on January 20, 2011, T-Mobile’s management team presented a clear path for renewed growth. T-Mobile described itself as a “challenger” and announced a plan to grow revenues by \$3 billion by 2014. That plan includes aggressively marketing smartphones and data on its new 4G network:

[T]he challenger strategy which will fuel all growth going forward. . . . We have five levers. The first one is we will not let our network competitive advantage go and we will therefore monetize our 4G network. . . . Second, we will focus on making the purchase and the use of smart phones affordable to all Americans. We estimate that about 150 million Americans want smart phones but do not have smart phones today. . . . Third, while we are the number one service Company in our industry having won more than ten times the J. D. Powers award which is really great, we aspire for more. We want to be one of America’s most trusted brands. . . . Part four and five of the strategy really focus on

¹⁶⁶ *Id.* at 102.

overcoming scale either on the revenue side which is a multi segment player or on the cost side which is challenger business model.¹⁶⁷

Similarly, René Obermann, the CEO of DT, said, “[w]e are convinced that T-Mobile is a very good asset. We have a 34 million customer base and in the first nine months of 2010 we generated revenues of over \$16 billion and over \$4.5 billion of EBITDA. And we are generating a positive operating free cash flow of between \$2.5 billion and \$3 billion per annum.”¹⁶⁸ The Commission also found that T-Mobile is a vigorous competitor, noting in the *14th CMRS Competition Report* that T-Mobile’s decision to lower the prices on its unlimited calling plans “appear[s] to have prompted Verizon and AT&T to narrow the price premium on unlimited service offerings.”¹⁶⁹

T-Mobile competes aggressively with AT&T on its website and in national television advertisements. T-Mobile’s advertising spend in the first half of 2010 was up over 40 percent from the first half of 2009.¹⁷⁰ T-Mobile’s advertising highlights AT&T’s slow network speeds compared to T-Mobile’s and touts T-Mobile’s cutting edge mobile broadband devices, such as the myTouch 4G.¹⁷¹ Senator Kohl, Chair of the U.S. Senate Judiciary Committee’s Subcommittee on Antitrust, Competition Policy and Consumer Rights, recently emphasized the direct competition between AT&T and T-Mobile:

Mr. Humm [of T-Mobile], on your website, you compare your prices for data service to AT&T’s and announce that your price for unlimited 4G data service is \$5 cheaper than AT&T’s price for 3G service. You also

¹⁶⁷ Jan. 20, 2011 Deutsche Telekom Briefing at 7-8.

¹⁶⁸ *Id.* at 2.

¹⁶⁹ *14th CMRS Competition Report* ¶ 92.

¹⁷⁰ Appendix A, Growth in Advertising Spend.

¹⁷¹ See Jan. 20, 2011 Deutsche Telekom Briefing at 23-34.

promote the fact that your unlimited voice, text and data service is \$35 cheaper than AT&T.¹⁷²

T-Mobile's head-to-head marketing of its smartphones and data services against AT&T appears to be paying off. T-Mobile's recent quarterly performance numbers show that its blended data ARPU increased more than 25 percent from the fourth quarter of 2009 to the fourth quarter of 2010.¹⁷³ As T-Mobile's CEO elaborated:

Now the good news is that if you look at the performance year over year in the last quarters, year over year revenue hit bottom at the end of 2009 and is now trending in the right direction driven mainly by data revenues as more customers adopt smart phones. . . . [O]ur blended data RPU is advancing at a rate of \$2.40 year over year or 24% over the last four quarters.¹⁷⁴

Indeed, even AT&T admits in its Application that T-Mobile has been making major advances in smartphone sales, noting that between the fourth quarter of 2009 and the end of 2010 the percentage of T-Mobile's customers using 3G/4G smartphones doubled from 12 percent to 24 percent.¹⁷⁵

2. AT&T's Claims that T-Mobile Has No Clear Path to LTE Are Misleading

AT&T's assertion that T-Mobile has no clear path for LTE misrepresents T-Mobile's ability to offer high-speed wireless broadband. While T-Mobile might be considered a

¹⁷² *The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 112th Cong. (May 11, 2011) Federal News Service Transcript at 41, available at: <<http://fednews.com/printtranscript.htm?id=20110511t3772>>.

¹⁷³ Press Release, T-Mobile, *T-Mobile USA Reports Fourth Quarter 2010 Results* (Feb. 25, 2011), available at: <<http://s.tmocache.com/Cms/Files/Published/0000BDF20016F5DD010312E2BDE4AE9B/5657114502E70FF3012B5A79D454F2C8/file/TMUSQ42010PressReleaseFinalv2.pdf>>.

¹⁷⁴ Jan. 20, 2011 Deutsche Telekom Briefing at 5.

¹⁷⁵ Application at 30.

late-comer to 3G, it has invested in rolling out a robust nationwide network and is well-positioned to compete for high-end services. It currently has the largest HSPA+ network (far larger than AT&T's) and, according to T-Mobile, its network is the largest and fastest 4G network with speeds of up to 21 Mbps.¹⁷⁶ According to DT's CEO, René Obermann, "[i]ndependent field surveys show that real life data transmission speeds on our network are superior to most competitors and they are at least equivalent to LTE."¹⁷⁷

T-Mobile plans to double the speed of its HSPA+ network in 2011 to 42 Mbps, has explained that speeds of 84 Mbps and beyond are possible on HSPA+, and believes that the HSPA+ network will be very competitive as LTE is slowly rolled out by Verizon and AT&T.¹⁷⁸ Looking further ahead, T-Mobile has stated that its network will be in a good position to roll out LTE at the appropriate time:

At the right point in time when it's needed for us we can roll out LTE more as a capacity overlay because there are awesome benefits and the capacity delivery of LTE in the right spectrum configurations that will drive better economics and better performance for our customers. But when we do that, we don't have to go and touch the lion's share of our cell sites at all. So, you can see our expectation on investment levels around the LTE rollout for T-Mobile USA are more in the \$1 billion to \$2 billion range for that radio infrastructure upgrade depending on how far we go and how deep we go.¹⁷⁹

¹⁷⁶ Jan. 20, 2011 Deutsche Telekom Briefing at 5.

¹⁷⁷ *Id.* at 2.

¹⁷⁸ *See id.* at 13 ("LTE is coming but it is going to take time for the technology to both mature from a technology perspective, for the bugs to be worked through that technology. It's also going to take time for the handset ecosystem to develop . . . [a] [m]uch richer ecosystem [is] now growing in the HSPA+ world which we will fully leverage at T-Mobile USA."). "HSPA" stands for High Speed Packet Access.

¹⁷⁹ *Id.* at 14.

3. T-Mobile's Pre-Announcement Statements Contradict AT&T's Claims that T-Mobile Will Not Be an Effective Competitor Due to Spectrum Limitations

AT&T argues that its acquisition of T-Mobile will not reduce competition because spectrum limitations will prevent T-Mobile from being a significant competitor if it remains independent. However, these claims are contradicted by recent statements from T-Mobile's Chief Technical Officer shortly before the deal with AT&T was reached:

[O]ne of the things that we're working aggressively on as we've been migrating our customer base from 1900 where we live with our GSM services today, all of that growth that's occurring in HSPA+ in the AWS spectrum is freeing up head room for our customers and for our business in 1900. It's almost a third of our base that's moved across to AWS. So, that's freeing up 1900 spectrum in many markets which opens up this opportunity we call refarm. That spectrum presents opportunities for us to deploy more HSPA+ or LTE and we're working through those option discussions right now. But there are many markets where already today we have a lot of 1900 spectrum we could repurpose. So, we're in a good position with refarm.¹⁸⁰

In addition, T-Mobile has told its investors that it has the financial ability to purchase additional spectrum if and when needed. As explained above, T-Mobile has outlined a clear path to grow revenues by three billion dollars over the next few years. In addition, it has indicated that it will be able to raise additional capital to fund its long-term spectrum needs through external sources and the sale of non-strategic assets, particularly its cell tower portfolio.¹⁸¹ Reuters reports an analyst's estimate that the sale of T-Mobile's 7,000 cell towers could raise up to two billion dollars.¹⁸² Such a sale would certainly raise significant capital that could be used

¹⁸⁰ *Id.* at 16.

¹⁸¹ *Id.* at 4.

¹⁸² Sinead Carew & Nadia Damouni, *T-Mobile USA eyes potential \$2 bln tower sale*, REUTERS (Jan. 20, 2011) (citing a Benchmark Company analyst), available at: <<http://www.reuters.com/article/2011/01/21/tmobileusa-idUSN2025129820110121>>.

to access additional spectrum for the long term. Thus, notwithstanding AT&T's doomsday assessment of T-Mobile's future, T-Mobile's own statements and objective evidence demonstrate that T-Mobile is, and would continue to be, a significant competitor in retail wireless absent its takeover by AT&T.

B. Local and Regional Firms with Only Seven Percent of the All Wireless Market Would Not Replace Competition from T-Mobile

AT&T also claims that its acquisition of T-Mobile would not significantly alter the competitive landscape because "other providers already fill – or could easily move to fill – the competitive role T-Mobile USA occupies today."¹⁸³ According to AT&T, notwithstanding the high levels of market concentration in local markets covering [begin NRUF/LNP confidential information] [end NRUF/LNP confidential information] percent of the U.S. population,¹⁸⁴ the presence of an assortment of smaller regional and local competitors in many of these areas will be sufficient to ensure that the market remains competitive. In particular, AT&T points to carriers such as MetroPCS (pre-paid), Leap (pre-paid), U.S. Cellular, Cellular South (which testified that if the merger is allowed, "all that will remain is the endgame, where the remaining non-Bell carriers wait their turn to be acquired or bled dry"),¹⁸⁵ Allied Wireless, Cincinnati Bell (with only about 500,000 subscribers), Cox Communications (a cable television company providing no facilities-based wireless services),¹⁸⁶ and possible future wholesalers Clearwire (with funding challenges and an evolving strategy) and LightSquared (with no end-user subscribers) as potential entrants.

¹⁸³ Application at 70.

¹⁸⁴ CRA Decl. ¶ 11.

¹⁸⁵ Meena Testimony at 5.

¹⁸⁶ Declaration of Scott Kalinoski, Attachment H at 1-2.

AT&T's arguments substantially overstate the competitive significance of a collection of firms that combined account for about seven percent of all wireless subscribers.¹⁸⁷ These local, regional, and wholesale carriers could not replace the competition that would be lost by AT&T's proposed acquisition. First, they do not and cannot constrain pricing by the national carriers to any meaningful extent.¹⁸⁸ Indeed, they would have no incentive to deter unilateral price increases by AT&T or coordination by the Twin Bells. Second, the four national players serve predominantly post-paid customers, while MetroPCS and Leap, two of the top three smaller players, serve predominately pre-paid customers.¹⁸⁹ Third, these smaller players are not attractive options for customers seeking the most recent and high performance handsets because they generally do not (and often cannot) offer them, nor do they have the customer bases or financial resources to regularly develop innovative handsets.¹⁹⁰ Indeed, Leap Wireless recently acknowledged in its Securities and Exchange Commission ("SEC") filings that "[a]s device selection and pricing become increasingly important to customers, our inability to offer customers the latest and most popular devices . . . could put us at a significant competitive disadvantage and make it more difficult for us to attract and retain customers."¹⁹¹ Fourth, the smaller carriers cannot match the cost-efficient nationwide coverage and functionality provided by the four national carriers.¹⁹² As explained above, they do not have nationwide networks, and their roaming services come with significant limitations, particularly with respect to text and

¹⁸⁷ CRA Decl. ¶ 44.

¹⁸⁸ *Id.* ¶ 131.

¹⁸⁹ *See supra* Part A, Section II.A.

¹⁹⁰ *See supra* Part A, Section III.B.

¹⁹¹ Leap Wireless International, Inc., Annual Report (Form 10-K), at 10 (Feb. 25, 2011).

¹⁹² *See supra* Section II.A.

data. Fifth, these smaller carriers cannot compete without access to backhaul and roaming, and the proposed T Mobile takeover would increase AT&T's control over these critical inputs and allow it to raise its rivals' costs. Sixth, these smaller carriers lack the brand strength to compete more widely. Seventh, these carriers are extremely small in comparison with AT&T and Verizon. While AT&T trumpets that in the fourth quarter of 2010 Leap and MetroPCS added 100,000 and 300,000 subscribers, respectively, the fact is they remain fringe players.¹⁹³ Finally, not even AT&T's own business people take potential competition from wholesalers such as LightSquared and Clearwire seriously. As John Stankey, President and CEO of AT&T Business Solutions, admits: "We have two people staking out a wholesale play in the market. It's hard in economic theory and it's hard in past practice in telecommunications to ever find a market where two wholesale players ever competed effectively."¹⁹⁴

V. THE PROPOSED TRANSACTION WOULD PROVIDE AT&T WITH UNPRECEDENTED CONTROL OVER SPECTRUM IDEALLY SUITED FOR MOBILE BROADBAND SERVICE

As part of its competitive analysis of a major transaction, the Commission must examine the effects that the transaction would have on the "input market for spectrum available for the provision of mobile telephony/broadband services."¹⁹⁵ As the Commission has pointed out, "[a]ccess to spectrum is a precondition to the provision of mobile wireless service. Ensuring that

¹⁹³ CRA Decl. ¶ 44; Press Release, AT&T, Inc., *AT&T Reports Record 2.8 Million Wireless Net Adds, Strong U-verse Sales, Continued Revenue Gains in the Fourth Quarter* (Jan. 27, 2011) available at: <<http://www.att.com/gen/pressroom?pid=18952&cdvn=news&newsarticleid=31519&mapcode=financial>>.

¹⁹⁴ Karl Bode, *AT&T's Stankey Trash Talks Clearwire, LightSquared: Suggests They Have to Merge to be Viable*, BROADBAND DSL REPORTS (May 16, 2011), available at: <<http://www.dslreports.com/shownews/ATTs-Stankey-Trash-Talks-Clearwire-Lightsquared-114242>>.

¹⁹⁵ *AT&T-Centennial Merger Order* ¶ 34.

sufficient spectrum is available for incumbent licensees, as well as for entities that need spectrum to enter the market, is critical for promoting competition, investment, and innovation.”¹⁹⁶ New entrants require access to sufficient spectrum to enter the wireless marketplace and compete with established licensees, while incumbents require additional spectrum to increase coverage or capacity as they expand their subscriber bases and work to meet increasing demand. Given the critical nature of this input, significant differences between carriers’ spectrum holdings can have a decisive impact on the provision of frequency-intensive mobile broadband services. If one carrier can hoard large volumes of this resource, other providers may have limited capacities and lack the bandwidth necessary to innovate and compete effectively for subscribers.¹⁹⁷

AT&T’s proposed acquisition of T-Mobile would transform the nation’s “input market for spectrum,” by providing AT&T with an extraordinary and unprecedented aggregation of bandwidth. The addition of T-Mobile’s population-weighted average of 50 MHz, along with Qualcomm’s 700 MHz holdings, would give AT&T a nationwide, population-weighted average of 144 MHz of spectrum for mobile telephony/broadband services – approximately 50 percent more than Verizon and almost three times Sprint’s current holdings. And, at the local market level, AT&T’s vast spectrum portfolio would exceed the Commission’s “spectrum screen” threshold in over one-quarter of all local market areas in the United States.

Beyond these megahertz counts, however, AT&T’s spectrum holdings at both the national and local levels following the transaction would be particularly formidable, because the

¹⁹⁶ 14th CMRS Competition Report ¶ 251.

¹⁹⁷ CRA Decl. ¶ 80. In addition, because there are significant scale economies in the provision of wireless services, a carrier with limited spectrum and a commensurately small subscriber share will likely have higher costs per subscriber than a carrier with large spectrum holdings and a large subscriber share. *Id.*

proposed takeover would add T-Mobile’s desirable AWS (1.7/2.1 GHz) and PCS (1.9 GHz) spectrum to AT&T’s already substantial share of “beachfront spectrum” below 1 GHz. This unprecedented aggregation of highly valuable spectrum would cause serious competitive harm in the mobile wireless marketplace. With AT&T (and Verizon) controlling the most valuable portion of the nation’s mobile telephony/broadband spectrum, Sprint and other competitors would be unable to meet their capacity needs in these core wireless spectrum bands. Without the same quantity or quality of spectrum as the Twin Bells, Sprint and other carriers would have to incur the costs associated with developing infrastructure, equipment, and ecosystems in new spectrum bands. Having shifted these development costs to its smaller competitors, AT&T could fully exploit the scale efficiencies and mature ecosystems in its own core spectrum bands. The Commission should prevent these anti-competitive harms and halt AT&T’s attempted spectrum grab by refusing to approve the Application.

A. Following the Proposed Transaction, AT&T Would Have Far More Nationwide Licensed Spectrum Suitable for Mobile Telephony/Broadband Services Than Any Other CMRS Carrier

As discussed in Part A, Section II.B., *supra*, competition among wireless service providers now takes place on a national basis, and the Commission should therefore evaluate the competitive effects of the proposed transaction at a national level. As part of this analysis, the Commission should closely examine the transaction’s impact on carriers’ *nationwide* spectrum holdings.

Today, AT&T already controls an enormous volume of nationwide spectrum suitable for mobile telephony/broadband services, given its extensive holdings in the 700 MHz, cellular, PCS, and AWS spectrum bands. This concentration of spectrum is shown in the chart below, which provides wireless carriers’ population-weighted nationwide spectrum holdings for mobile

telephony/broadband services. These carriers include the four national providers, MetroPCS, Leap, U.S. Cellular, and mobile broadband provider Clearwire (which is not a CMRS provider).¹⁹⁸ As shown, including the 700 MHz spectrum that AT&T is acquiring from Qualcomm,¹⁹⁹ AT&T has a nationwide average of 94 MHz of spectrum suitable for mobile

¹⁹⁸ This chart does not include spectrum in the 2.5 GHz band (such as Educational Broadband Service (“EBS”) spectrum) that the Commission has found unsuitable for mobile telephony/broadband services in its spectrum screen analysis. *See infra* at Part A, Section V.C.1. In addition, the chart’s attribution of 14 MHz of 800 MHz spectrum to Sprint is based not on a population-weighted nationwide spectrum calculation, but instead on a general assessment of Sprint’s current Enhanced Specialize Mobile Radio (“ESMR”) spectrum holdings in this band. Because the 800 MHz band is in the midst of a multi-year reconfiguration process, a precise, population-weighted analysis in this band is not feasible at this time. Sprint’s spectrum at 800 MHz is presently unavailable for broadband deployment due to the interleaved nature of this spectrum and its proximity to public safety receivers. In addition, it is not yet known how much 800 MHz spectrum Sprint will be able to utilize in the areas adjacent to the U.S.-Mexico border. *See, e.g., Improving Public Safety Communications in the 800 MHz Band*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, 19 FCC Rcd 14969 (2004) (“800 MHz Report and Order”), *aff’d sub nom. Mobile Relay Associates v. FCC*, 457 F.3d 1 (D.C. Cir. 2006).

¹⁹⁹ On January 13, 2011, AT&T and Qualcomm Incorporated (“Qualcomm”) submitted an application seeking the Commission’s approval for the assignment of Qualcomm’s Lower 700 MHz band licenses to AT&T. Application of Qualcomm Incorporated, Assignor, to AT&T Mobility Spectrum LLC, Assignee, File No. 0004566825, WT Docket No. 11-18 (Jan. 13, 2011) (“AT&T-Qualcomm Application”). If approved, this transaction will enable AT&T to acquire Qualcomm’s six Lower 700 MHz D Block (6 MHz) licenses, which collectively have a nationwide footprint, and five Lower 700 MHz E Block (6 MHz) licenses in five large markets.

In addition to these Qualcomm licenses, there are pending applications to assign or transfer 44 other 700 MHz band licenses to AT&T. *See* ULS File Nos. 0004544869 and 0004544863 (proposing the assignment of six Lower 700 MHz B Block licenses and three Lower 700 MHz C Block licenses from Whidbey Telephone Company to AT&T); ULS File No. 0004621016 (proposing the assignment of one Lower 700 MHz C Block license from 700 MHz, LLC to AT&T); ULS File No. 0004635440 (proposing the assignment of one Lower 700 MHz B Block license from Knology of Kansas, Inc. to AT&T); ULS File No. 0004643747 (proposing the transfer of control of five Lower 700 MHz B Block licenses and seventeen Lower 700 MHz C Block licenses from Redwood Wireless Corp. to AT&T); ULS File No. 0004681773 (proposing the assignment of one Lower 700 MHz B Block license from Windstream Lakedale, Inc. to AT&T); ULS File No. 0004681771 (proposing the assignment of three Lower 700 MHz B Block licenses from Windstream Iowa Communications, Inc. to AT&T); ULS File No. 0004699707 (proposing the assignment of one Lower 700 MHz B Block license from Maxima

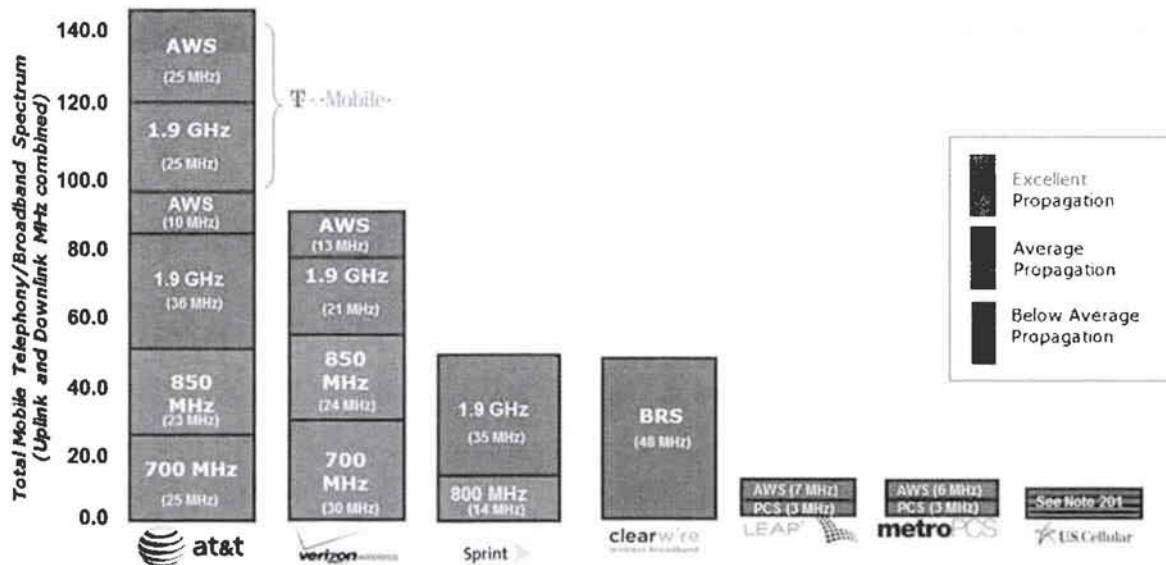
telephony/broadband services, exceeding Verizon's total of 88 MHz.²⁰⁰ On a nationwide basis, AT&T has approximately 90 percent more spectrum than Sprint and T-Mobile each, and Verizon has approximately 75 percent more spectrum than each of those carriers. In addition, AT&T and Verizon each has more than three times the amount of spectrum held by MetroPCS, Leap, and U.S. Cellular²⁰¹ combined. As T-Mobile itself has observed, "substantial disparity has developed between the spectrum holdings of the two largest U.S. wireless carriers and the more limited spectrum resources of all of their competitors."²⁰²

International, LLC to AT&T); ULS File No. 0004448347 (proposing the assignment of six Lower 700 MHz C Block licenses from D&E Investments, Inc. to AT&T).

²⁰⁰ AT&T also holds a nationwide average of approximately 13 MHz of Wireless Communications Service ("WCS") spectrum in the 2.3 GHz band. Sprint does not include this WCS spectrum in the chart below, despite the Commission's 2010 order amending its WCS rules to "enable licensees to provide mobile broadband services in 25 megahertz of the WCS band." *Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band*, Report and Order and Second Report and Order, 25 FCC Rcd 11710, ¶ 1 (2010) ("*WCS R&O*"). Sprint takes this conservative approach toward AT&T's WCS holdings in light of the Commission's previous exclusion of WCS frequencies from its spectrum screen analysis.

²⁰¹ U.S. Cellular holds approximately 2 MHz of spectrum in each of the 700 MHz, 850 MHz, 1.9 GHz (or PCS), and AWS bands, for a total of 8 MHz.

²⁰² Letter from Thomas Sugrue, Vice President, Government Affairs, T-Mobile USA, Inc., to Chairman Rick Boucher and Ranking Member Cliff Stearns, H. Subcomm. on Communications, Technology and the Internet, at 3 (Sep. 23, 2009), attached to Letter from Cheryl A. Tritt, Counsel to T-Mobile USA, Inc., to Marlene H. Dortch, FCC Secretary, WT Docket No. 06-150 (Sept. 24, 2009).



As shown in the chart, AT&T is now asking the Commission to grant it unprecedented nationwide control over spectrum used for mobile telephony/broadband services. Grant of the instant Application would increase AT&T's concentration of spectrum in the PCS and AWS bands by approximately 50 MHz, based on T-Mobile's current population-weighted nationwide holdings. Thus, if the Commission approves the proposed takeover, AT&T would hold a nationwide average of 144 MHz suitable for mobile telephony/broadband services, far exceeding even Verizon's holdings. AT&T would have nearly *three times* Sprint's nationwide spectrum holdings, and more than *five times* the *combined* holdings of MetroPCS, Leap, and U.S. Cellular.

As described *infra* at Part A, Section V.C.2, were the Commission to grant this vertically integrated Bell company unprecedented control over the wireless industry's core spectrum bands, the resulting spectrum imbalance would cause serious competitive harm, both nationally and at the local level. The Commission should refuse to permit this outcome.

B. AT&T's Post-Transaction Spectrum Holdings Would Exceed the Spectrum Screen Threshold in Over One-Quarter of Local Markets

Since 2004, the Commission has utilized an initial “spectrum screen” to guide its competitive analysis of major wireless transactions in local markets.²⁰³ In markets where applicants’ volume of spectrum falls below the Commission’s spectrum screen threshold, the Commission has presumed that the proposed spectrum aggregation will have no adverse competitive effects. In local markets where the applicants’ combined holdings exceed the screen threshold, the Commission conducts a further analysis of the proposed transaction’s effects on competition.²⁰⁴

In its spectrum screen analysis, the Commission has included all spectrum that it believes will be “suitable” for mobile telephony/broadband service within two years.²⁰⁵ Under the Commission’s standard, “suitability” is determined by “whether the spectrum is capable of supporting mobile service given its physical properties and the state of equipment technology, whether the spectrum is licensed with a mobile allocation and corresponding service rules, and whether the spectrum is committed to another use that effectively precludes its uses for mobile telephony broadband services.”²⁰⁶ The Commission’s spectrum screen threshold is set at

²⁰³ *AT&T-Cingular Merger Order* ¶¶ 81, 109-12; *Sprint Nextel-Clearwire Merger Order* ¶¶ 54-74; *Verizon-Atlantis Merger Order* ¶¶ 54-70; *AT&T-Centennial Merger Order* ¶¶ 43-51.

²⁰⁴ *Sprint Nextel-Clearwire Order* ¶¶ 30, 79-80; *Verizon-Atlantis Merger Order* ¶¶ 41, 75; *AT&T-Centennial Merger Order* ¶¶ 34, 46. As described above, the Commission’s competitive analysis should not be limited to a further review of competitive conditions in these local markets. Because competition among wireless carriers now occurs on a national basis, the Commission should also assess the competitive impact of the proposed takeover at the national level.

²⁰⁵ *Sprint Nextel-Clearwire Order* ¶ 61; *Verizon-Atlantis Merger Order* ¶ 62.

²⁰⁶ *Sprint Nextel-Clearwire Order* ¶ 53. See also *Verizon-Atlantis Merger Order* ¶ 62; *AT&T-Centennial Merger Order* ¶ 43.

approximately one-third the volume of spectrum that is suitable for mobile telephony/broadband services.

In its most recent orders, the Commission has found that the amount of spectrum suitable for mobile telephony/broadband services varies on a market-by-market basis. The Commission has considered at least 280 MHz of spectrum to be suitable in all markets; this amount includes 50 MHz of 850 MHz cellular band spectrum, 120 MHz of PCS spectrum, 30 MHz of spectrum in the 800 MHz and 900 MHz Specialized Mobile Radio (“SMR”) bands, and 80 MHz of 700 MHz spectrum.²⁰⁷ The Commission has included an additional 90 MHz of spectrum in the AWS band in markets where that band has been cleared and is available, and an additional 55.5 MHz of Broadband Radio Service (“BRS”) spectrum in markets where the 2.5 GHz transition has been completed. Thus, in markets where both AWS and BRS spectrum are available, the Commission has found that 425.5 MHz of spectrum are suitable for mobile telephony/broadband services, and established a spectrum screen of 145 MHz.²⁰⁸

The Applicants concede that if the Commission applies this spectrum screen, “202 CMAs would be flagged by [this] screen and subject to further analysis.”²⁰⁹ This total represents over one-quarter of the 734 CMAs in the United States. Thus, if the Commission’s own spectrum

²⁰⁷ *Sprint Nextel-Clearwire Order* ¶ 54; *Verizon-Atlantis Merger Order* ¶ 54; *AT&T-Centennial Merger Order* ¶ 46.

²⁰⁸ *Sprint Nextel-Clearwire Order* ¶¶ 70, 72, 74; *Verizon-Atlantis Merger Order* ¶¶ 65-66; *AT&T-Centennial Merger Order* ¶ 46. In markets where AWS but not BRS spectrum is available, the Commission has found that 370 MHz are suitable for mobile telephony/broadband, and set the spectrum screen at 125 MHz. In markets where BRS but not AWS spectrum is available, 335.5 MHz are considered suitable for these services, and the Commission has set the spectrum screen at 115 MHz. Finally, in markets where neither AWS nor BRS spectrum is available, 280 MHz are considerable for mobile telephony/broadband, and the applicable screen has been set at 95 MHz.

²⁰⁹ Application at 76. The Applicants’ analysis presumes Commission approval of AT&T’s pending application to acquire Qualcomm’s 700 MHz spectrum.

screen calculations confirm AT&T's results, the Commission would further scrutinize the competitive effects of the proposed transaction in each of these 202 CMAs.

C. In Analyzing the Competitive Effects of the Proposed Transaction, the Commission Must Account for the High Value of AT&T's Spectrum

1. Not All Spectrum Is Created Equal

While AT&T's simple megahertz counts are alarming enough, they do not provide a true measure of AT&T's would-be dominance over the most commercially valuable segments of the radio spectrum were its Application approved. As the Commission has acknowledged, one megahertz of spectrum in a particular frequency band does not hold the same value as one megahertz in another band.²¹⁰ The wide variation in spectrum values across different bands is highlighted in the CRA Declaration, which provides an analysis of the disparate value of wireless carriers' overall spectrum holdings (based on the book values reported by the carriers in their annual filings to the SEC).²¹¹ As described *infra* at Part A. Section V.C.2, this analysis demonstrates the extraordinary size and marketplace value of AT&T's post-transaction spectrum portfolio.

As the Commission is aware, spectrum bands can differ from one another in numerous technical, operational, and regulatory aspects, including the following:

- Signal propagation characteristics;
- Availability of network equipment and consumer handsets;
- Size and contiguity of spectrum blocks;
- Availability of paired bands for uplink and downlink transmissions;
- Technical restrictions, such as guard bands or power limits, to protect other services from interference;

²¹⁰ See, e.g., *14th CMRS Competition Report* ¶¶ 268-73.

²¹¹ CRA Decl. ¶ 85, Table 6.

- Cost of clearing incumbent users, and status of band clearing;
- Population density of coverage area;
- Need for coordination or other complex negotiations with other licensees (e.g., lease negotiations between commercial operators and EBS licensees).

In particular, as described in the CRA Declaration, the relative availability of network infrastructure and equipment is one key determinant of a spectrum band's value.²¹² "Mature" spectrum bands already in use – such as the cellular, PCS, and AWS bands – are replete with existing infrastructure and equipment, and are typically more valuable than undeveloped spectrum bands where the future availability of infrastructure and equipment is dependent on extensive research and the cost-intensive design, testing, and production of new components and facilities.²¹³ Over time, as an "ecosystem" of equipment manufacturers and technology vendors emerges in a particular band and generates the necessary equipment and infrastructure for that band, the cost of deployment declines and the spectrum in that band becomes more valuable.²¹⁴

In its *14th CMRS Competition Report*, the Commission described the particularly favorable attributes of the "beachfront" spectrum below 1 GHz, where AT&T has substantial holdings, as detailed below.²¹⁵ The Commission stated that these lower frequency bands have better intrinsic spectrum propagation than spectrum in higher bands and therefore provide signal coverage over larger geographic areas, including in adverse climate conditions and through difficult terrain. Operations in these bands also provide superior penetration of buildings, vehicles, and other physical obstacles. In contrast to higher frequency bands such as the PCS,

²¹² *Id.* ¶¶ 109-10.

²¹³ *Id.*

²¹⁴ *Id.* ¶ 110.

²¹⁵ *14th CMRS Competition Report* ¶¶ 269-71.

AWS, and 2.5 GHz bands, these “excellent” propagation characteristics make the lower bands “ideal for delivering advanced wireless services to rural areas.”²¹⁶ To achieve equivalent coverage, a licensee that holds spectrum in a higher frequency range generally must construct more cell sites at greater cost than a licensee with primary holdings in a lower frequency band.²¹⁷

T-Mobile itself has repeatedly stated that the optimal propagation characteristics of beachfront spectrum below 1 GHz provide significant advantages in the provision of mobile telephony/broadband services. Noting that “not all spectrum is created equal,” T-Mobile has pointed out that “[l]ower frequency bands can transmit more bandwidth over longer distances than higher frequencies, meaning that each cell site transmitting in the lower frequencies is capable of reaching much broader swaths of coverage.”²¹⁸ Because fewer cell sites are needed, build-out at 700 MHz and in the 850 MHz cellular band can be achieved “at less expense to the carrier and therefore lower cost to consumers.”²¹⁹

Other factors at 700 MHz also help make this spectrum *optimal* for commercial mobile broadband service (excluding the Upper 700 MHz D Block, as described *infra* at Part A, Section V.D.). The Commission adopted flexible service rules for the 700 MHz band that permit a range of fixed and mobile wireless operations, including frequency division duplex (“FDD”) technologies such as LTE that require band pairing. In addition, with the completion of the

²¹⁶ *Id.* ¶ 269.

²¹⁷ *Id.* ¶ 270. For instance, Sprint estimates that deployments in the PCS band at 1.9 GHz require approximately three times more cell sites than build-outs in the cellular band, and that deployments in the 2.5 GHz band require approximately six to seven times more cell sites than those in the 700 MHz band.

²¹⁸ Letter from Kathleen O’Brien Ham, T-Mobile USA, Inc., to Marlene H. Dortch, FCC Secretary, WT Docket No. 06-150, at 1 (Apr. 26, 2010).

²¹⁹ Letter from Russell H. Fox, Counsel for T-Mobile USA, Inc., to Marlene H. Dortch, FCC Secretary, WT Docket No. 10-133, at 1-2 (Dec. 2, 2010).

digital television (“DTV”) transition, the 700 MHz band is free of incumbents and available for commercial mobile wireless use, in contrast to other bands where new entrants must engage in the expensive and time-consuming relocation of incumbent licensees. Finally, there should be no significant interference issues affecting the provision of service in this spectrum; while some commercial wireless spectrum is adjacent to public safety frequencies in the Upper 700 MHz band, commercial operators and public safety entities are expected to deploy compatible LTE systems.

AT&T already has enormous holdings in the beachfront spectrum below 1 GHz, including in the 700 MHz band. AT&T holds a nationwide average of 48 MHz of spectrum below 1 GHz – more than three times Sprint’s ESMR holdings in the 800 MHz band, and slightly less than Verizon’s 54 MHz below 1 GHz. Even before AT&T’s acquisition of Qualcomm’s licenses, AT&T and Verizon together control *92 percent* of the paired 700 MHz spectrum suitable for commercial mobile broadband use in the top 54 most populous U.S. markets, and *100 percent* of the paired 700 MHz spectrum suitable for commercial mobile broadband use in the top 10 markets.²²⁰ The acquisition of Qualcomm’s 700 MHz spectrum increases AT&T’s 700 MHz concentration by on average an additional 8 MHz, bringing AT&T’s below-1 GHz total to 56 MHz.

In comparison, the higher-frequency spectrum bands are not as advantageous for mobile broadband development. Clearwire and other BRS licensees in the 2.5 GHz band, for instance, face technical, regulatory, and licensing issues that make their spectrum significantly less

²²⁰ See Statement, attached to Letter from Charles W. Logan, Counsel to Access Spectrum, LLC, to Marlene H. Dortch, FCC Secretary, WT Docket No. 06-150, at 1 (June 17, 2010) (submission on behalf of a coalition that included T-Mobile).